IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH H. GIUFFRIDA	:	CIVIL ACTION
	:	
v.	:	
	:	
AMERICAN FAMILY BRANDS, INC.	:	No. 96-7062

AMERICAN FAMILY BRANDS, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
GIUFFRIDA ENTERPRISES, INC, et al.	:	No. 96-7256

O'Neill, J. April , 1998

MEMORANDUM

These breach of contract actions concern the sale of substantially all of the assets of a family-owned business that distributed and manufactured various meat, poultry and other food products (96-7256) and an employment contract related to that sale (96-7062). The buyer, American Family Brands, Inc. (AFB), purchased substantially all of the assets of Freda Corporation and its wholly-owned subsidiaries (collectively "Freda") for $19,434,129 pursuant to a lengthy and detailed Purchase Agreement executed on March 18, 1996.[1] The sellers are five members of the Giuffrida family who ran the business from 1956 until 1996. AFB contends that the sellers breached various provisions of the Purchase Agreement.

In addition, contemporaneously with the closing, AFB and Joseph Giuffrida entered into an employment contract . In his action, Joseph Giuffrida contends that AFB breached that contract by failing to pay him the salary due thereunder. Admitting nonpayment, AFB asserts that Giuffrida

[1] Freda Corporation's wholly-owned subsidiaries included C.D. Moyer Company, Kohler Delicatessen Meats, Inc. and Kohler Urban Renewal Corporation.

breached the contract first by refusing to perform duties assigned pursuant to the contract. Before me are AFB's motion for partial summary judgment and the sellers' motion for summary judgment on all claims.

I. Summary Judgment Standard

When considering a motion for summary judgment, I must view all evidence and resolve all doubts in favor of the non-moving party. Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1297 (3d Cir. 1993); Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 (3d Cir. 1983). I may grant summary judgment only "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); SEC v. Hughs Capital Corp., 124 F.3d 449, 452 (3d Cir. 1997). To determine whether there is a genuine issue of material fact, I must ask whether a jury could reasonably return a verdict for the non-moving party. Anderson v. Liberty lobby, Inc., 477 U.S. 242, 248 (1986).

As to many of the same issues, both AFB and the sellers have moved for summary judgment. The applicable legal standards by which I decide a summary judgment motion do not change when the parties file cross-motions. Appelmans v. City of Philadelphia, 826 F.2d 214, 216 (3d Cir. 1987); Manufacturers Life Ins. Co. v. Dougherty, 1997 WL 778585, *2 (E.D. Pa. 1997).

II. Discussion - Alleged Breach of the Purchase Agreement

AFB contends that the sellers breached various provisions of the Purchase Agreement, and resolution of the motions requires interpretation of the language of the Agreement. Under

Pennsylvania law,[2] I interpret the Agreement to determine the objectively-manifested intent of the contracting parties. Mellon Bank, N.A. v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1009 (3d Cir. 1980). I must first decide whether the Agreement is ambiguous. Stenardo v. Federal Nat'l Mortgage Ass'n, 991 F.2d 1089, 1094 (3d Cir. 1993). "A contract provision is ambiguous if it is susceptible of two reasonable alterative interpretations. Where the written terms of the contract are not ambiguous and can only be read one way, the court will interpret the contract as a matter of law." Hullett v. Towers, Perrin, Forster & Crosby, Inc., 38 F.3d 107, 111 (3d Cir. 1994) (citations omitted).[3] If, however, I find ambiguity in the language of the contract, the interpretation is left to the jury "to resolve the ambiguity in light of the extrinsic evidence." Id.

Pennsylvania courts apply the "plain meaning rule" of contract interpretation which "presume[s] that the parties' mutual intent can be ascertained by examining the writing." Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 613 (3d Cir. 1995). A court, however, is not always confined to the four corners of the written contract, but may examine the context in which the agreement arose. Hullett, 38 F.3d at 111, citing Steuart v. McChesney, 444 A.2d 659, 662 (Pa. 1982). In the end, to determine whether an ambiguity exists, I must "consider the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning." Mellon, 619 F.2d at 1011.

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[2] Both parties agree that Pennsylvania law governs this action.

[3] See also Samuel Rappaport Family Partnership v. Meridian Bank, 657 A.2d 17, 21-22 (Pa. Super. Ct. 1995) ("A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction."); Krizovensky v. Krizovensky, 624 A.2d 638, 642-43 (Pa. Super. Ct. 1993).

A. Alleged Breach of "No Material Adverse Change" Representation and Warranty

Included in the "Representations and Warranties of the Sellers" section of the Purchase Agreement is the following representation and warranty related to the change in the financial condition of sellers from the date of the last audited financial statements to the date of the closing:

> Except as set forth in Schedule 5(a) hereto,[4] since August 26, 1995, there have been no material adverse changes in the condition (financial or otherwise), assets, liabilities, earnings, or properties, of any of the Sellers[.]

Purchase Agreement § 5(g).[5] The Agreement also contains a section titled "Survival of Representations, Warranties, Etc." which reads:

> All of the representations, warranties, covenants and agreements made by the parties to this Agreement shall survive the execution and delivery of this Agreement and the consummation of the transactions contemplated hereunder for a period of two (2) years after the Closing Date[.]

Id. § 10. Under the miscellaneous section of the Agreement there is also a non-waiver subsection which provides:

> No waiver of the provisions hereof shall be effective unless in writing and signed by the party to be charged with such waiver.

Id. § 13.

AFB contends that there was a material adverse change in the sellers' financial condition resulting in a breach of the express representation and warranty in § 5(e) of the Agreement that survived closing. Sellers, however, contend that AFB closed with knowledge of the change in the

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[4] Schedule 5(a) contains no limitations on this warranty.

[5] AFB's motion for partial summary judgment sought a ruling that this provision is a clear and unambiguous promise which is not limited to events outside the ordinary course of business. Sellers apparently concede this point because they do not argue the contrary. In any event, the unambiguous language of this provision does not include a limitation and therefore I will sustain AFB's position on this point.

financial condition of sellers, and that therefore AFB did not rely on the truth of the warranty and waived any claim pursuant to § 5(e).[6]

Prior to executing the Purchase Agreement, the parties signed a "Letter of Intent" under which AFB had the right to cancel the purchase without any liability if it was dissatisfied with the results of its due diligence. As part of its due diligence AFB received Freda's interim financial statements for the "stub period" -- the period between the last audited financial statements, August 25, 1995, and the date of the closing, March 18, 1996.[7] Laurence Needleman, AFB's Chief Financial Officer, prepared an analysis of those interim financial statements which showed a significant reduction in earnings. The downturn was so severe that Needleman concluded that "[r]esults of operations for Freda Corp. through Jan., 1996 indicate that the company has been severely mismanaged during the last three months." See Needleman Memo, March 4, 1996.

Sellers contend that because AFB knew about the changes in the financial condition of Freda during the stub period, as evidenced by this memorandum, it is precluded from relying on the no material adverse change representation and warranty. AFB argues that under Pennsylvania law and the plain language of the Purchase Agreement reliance on the representation and warranty is not a requirement of its breach of warranty claim and therefore it did not waive its claim by closing.

The Pennsylvania Supreme Court has not decided whether reliance is a required element in

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[6] The parties also contend that there is no genuine issue of material fact with respect to the materiality of the adverse change. I do not agree and will submit this issue to the jury.

[7] Freda gave AFB two separate "stub period" financial statements. The first covered the 22-week period between August 25, 1995 and the end of January 1996 and was given to AFB several weeks before the closing. The second covered the 27-week period between the end of August 1995 and the end of February 1996 and was given to AFB several days before the closing.

a contractual breach of representation and warranty claim,[8] and the decisions in other jurisdictions are divided. As a federal judge applying Pennsylvania law without guidance from the Pennsylvania Supreme Court, I must attempt to predict what that Court would hold if presented with this question.

In Land v. Roper Corp., 531 F.2d 445 (10th Cir. 1976), the court held that under Kansas law reliance on an express warranty by the buyer of a business is essential to maintenance of its breach of express warranty claim.[9] The Court found the Uniform Commercial Code's reliance requirement for breach of warranty claims could be applied by analogy to the sale of a business. Roper.531 F.2d at 448. It also supported its holding by reference to Kansas tort law, and the reliance requirement in tortious misrepresentation claims. Id. at 448-49. The Court of Appeals for the Seventh Circuit, relying exclusively on Minnesota precedent, reached the same decision with regard to Minnesota law. Hendricks v. Callahan, 972 F.2d 190, 192-94 (7th Cir. 1992).

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[8] The Pennsylvania Supreme Court's decision in In re Claim Against Escrow Fund under Agreement with John Carter, 134 A.2d 908 (Pa. 1957), does not speak to whether the Court would require reliance as an element of a contractual breach of express warranty claim. In that case, concerning a purchase of all of the outstanding stock of the seller, the buyer alleged that seller breached a representation and warranty that there had been no adverse changes in the financial condition of seller during the stub period. In contrast to the instant case, however, the purchase agreement in Carter did not include a "no material adverse change" warranty and representation. The agreement listed as a condition precedent to closing that there was no material adverse change in the financial condition of the seller during the stub period, and buyer unsuccessfully sought to present extrinsic evidence showing that the parties intended to include a no material adverse change warranty and representation.

The Supreme Court held that the purchase agreement's language was clear and unambiguous, and that the "admission of such evidence would vary and change the language of the agreement and that its exclusion was eminently proper under the circumstances." Id. at 912. The Court found no need to delve into the distinctions between warranties and conditions precedent because the language of the agreement specifically identified the no material adverse change provision as a condition precedent and provided a remedy should the seller breach that condition -- the buyer would have the right to refuse to close the transaction. The Court's decision thus depended solely on the language of the agreement before it.

In this case, there is no dispute that the "no material adverse change" provision is a representation and warranty and not a condition precedent to closing.

[9] In Kazerouni v. De Satnick, 228 Cal.App.3d (2d Dist. 1991) the Court reached a similar conclusion applying California law but did so in a summary fashion without regard for the conflict in authority discussed herein.

Reliance as an element of a breach express warranty claim, however, has been rejected in Shambaugh v. Lindsay, 445 N.E.2d 124, 126-27 (Ind.App. 3 Dist. 1983) and Weschler v. Long Island Rehabilitation Center of Nassua, Inc., 1996 WL 590679, *21-22 (Mass. Super. Ct. 1996) (applying Indiana and Massachusetts law respectively). In Shambaugh the court examined the conflicting case law and concluded that:

> The problems of reliance, and a right to rely, on the representations do not appear when the action is grounded in warranty. The warranty is as much a part of the contract as any other part, and the right to damages on the breach depends on nothing more than the breach of warranty.

Shambaugh, 445 N.E.2d at 126-27, citing Glacier Gen. Assur. Co. v. Cas. Indem. Exchange, 435 F. Supp. 855, 860-61 (D. Mont. 1977).[10] This holding was grounded in the view that a warranty "is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself." Id., citing Metropolitan Coal Co. v. Howard, 155 F.2d 780, 784 (2d Cir. 1946) (L. Hand, J.).[11] The Wechsler court held that reliance was not a requirement for breach of express warranty claims using similar reasoning: "[a]n express warranty serves in substance as an agreement on the part of the warrantor to indemnify the other party if the fact or condition guaranteed to be true turns out not to be so." Wechsler, 1996 WL 590679 at *23.

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[10] See Ainger v. Michigan General Corp, 476 F. Supp. 1209, 1224-25 (S.D.N.Y. 1979) ("Transporting tort principles into contract law seems analytically unsound. If a party to a contract purchases a promise, he should not be denied damages for breach on the grounds that it was unwise or unreasonable for him to do so."), aff'd, 632 F.2d 1025 (2d Cir. 1980).

[11] See Metropolitan, 155 F.2d at 784 ("To argue that the promisee is responsible for failing independently to confirm [the warranty], is utterly to misconceive its office."); Gulf Oil Corp. v. Federal Power Comm'n, 563 F.2d 588, 599 (3d Cir. 1977) ("In essence a warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself. Thus, a warranty amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue.") (citation omitted).

In between these two lines of cases is New York law. Under New York law, reliance is generally not a requirement of a breach of an express warranty claim. The rationale supporting this view is similar to that of Shambaugh and Weschler:

> This view of "reliance" -- i.e., as requiring no more than reliance on the express warranty as being part of the bargain between the parties -- reflects the prevailing perception that an action for breach of express warranty is one that is no longer grounded in tort, but essentially in contract.[12] The express warranty is as much a part of the contract as any other term. Once the express warranty is shown to have been relied on as part of the contract, the right to be indemnified in damages for its breach does not depend on proof that the buyer thereafter believed that the assurances of fact made in the warranty would be fulfilled. The right to indemnification depends only on establishing that the warranty was breached.

CBS, Inc. v. Ziff-Davis Publishing Co., 75 N.Y.2d 496, 503-04 (N.Y. 1990) (citations and internal quotations omitted, footnote added). New York law, however, also provides a defense to a breach of express warranty claim where the "buyer closes on a contract with full knowledge and acceptance of facts disclosed by the seller which would constitute a breach of warranty under the terms of the contract . . . unless the buyer expressly preserves his rights under the warranties." Galli v. Metz, 973 F.2d 145, 151 (2d Cir. 1992)

In Pegasus Management Co., Inc. v. Lyssa, Inc., 1998 WL 59394 (D. Mass. February 6, 1998) the Court was faced with predicting which line of authority the Connecticut Supreme Court would follow. While the Court rejected the Roper / Hendricks line of cases, it found it unnecessary to choose between the New York cases and the Shambaugh / Weschler line of cases because of the following language of the purchase agreement:

> Every . . . warranty . . . set forth in this Agreement and . . . the rights and remedies

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[12] See Williams v. West Penn Power Co., 467 A.2d 811, 814 (Pa. 1983) ("An action for breach of warranty originally sounded in tort[.] Later[,] the existence of a warranty deemed the action to be one of contract.").

> . . . for any one or more breaches of this Agreement by the Sellers shall . . . not be deemed waived by the Closing and shall be effective regardless of any . . . prior knowledge by or on the part of the Purchaser[.]

Id. at *10. The Pegasus court held that, faced with the language of the agreement, the Connecticut Supreme Court would not require reliance with respect to plaintiff's breach of warranty claim.

I follow a similar approach in predicting that the Pennsylvania Supreme Court would not require AFB to prove reliance to maintain its breach of warranty claims. First, I conclude that the Pennsylvania Supreme Court would not adopt the Roper / Hendricks line of cases because that approach is inconsistent with the commercial realities of these complex purchase agreements negotiated over several months by sophisticated parties. The representations and warranties in these transactions define and apportion the risks that the parties negotiated. The amount of risk assumed by the sellers is part of the bargain and protects the investment that buyers make in sellers' business. If the sellers were not willing to take on the risk reflected in the representations and warranties, the buyers may have reduced their offer or not gone forward with the transaction at all. I find that the Roper / Hendricks approach is inconsistent with this commercial reality because it permits sellers to escape liability for negotiated representations and warranties by arguing to a fact-finder that buyers did not rely on the representations and warranties. Thus, in essence, the Roper / Hendricks approach allows contracting parties to avoid the plain meaning and effect of the contract to which they agreed.

The approach also injects a degree of unneeded uncertainty into these already complex transactions by making the enforceability of the representations and warranties subject to a fact-finders determination. Under the Roper / Hendricks approach, at the time of the closing there is a degree of uncertainty because the parties cannot be sure whether a fact-finder will hold the sellers to the representations and warranties they made in the purchase agreement or whether it will hold

that buyers' lack of reliance precludes recovery.

Finally, the Roper / Hendricks approach discourages complete due diligence because the more complete buyers' due diligence the more likely a fact-finder will find that they did not rely on the accuracy of the representations and warranties. The law, however, should encourage complete due diligence to ensure that buyers are aware of what they are purchasing and the associated benefits and risks of that purchase. For these reasons, I predict that the Pennsylvania Supreme Court would not adopt the Roper / Hendricks approach.[13]

Like the court in Pegasus, however, I find it unnecessarily to predict which of the two remaining lines of cases the Pennsylvania Supreme Court would adopt because the language of the instant Purchase Agreement would compel the same conclusion whichever authority applies. Under the more pro-seller New York approach, sellers may avoid liability by showing that the buyer was aware of the inaccuracies in the warranties prior to closing and that the buyer did not expressly preserve a breach of warranty claim. Here, the Purchase Agreement included a non-waiver provision, see § 13 quoted supra p. 4, and a provision providing that all representations and warranties shall survive closing plus two years, see § 10 quoted supra p. 4. I conclude that these provisions unambiguously preserved buyer's breach of warranty claim against a defense of non-reliance such as asserted by the sellers.[14]

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[13] While I do not find its reasoning persuasive, I also note that the Pegasus court concluded that the Connecticut Supreme Court would not adopt the Roper / Hendricks rationale. The Court found that those "decisions were by federal Courts of Appeals that were trying to divine the state law in circumstances in which the highest court in the state had not been presented with the issue. Thus, there was no discussion of the merits of the conflicting legal doctrines; rather, the effort was to discern what the state of the law in those states was." 1998 WL 59394 at *11.

[14] This holding is consistent with Pennsylvania law that waiver must be intentional and requires a "clear, unequivocal and decisive act of the party with knowledge of such a right and an evident purpose to surrender it." Zivari v. Willis, 611 A.2d 293, 295 (Pa. Super. Ct.), quoting, Brown v. City of Pittsburgh, 186

B. Other Post-Acquisition Claims

AFB seeks recovery for several other claimed breaches of the Purchase Agreement, and sellers have moved for summary judgment on all of those claims. AFB retained a damages expert, Lindquist, Avey, Macdonald & Baskerville, to calculate its claimed damages from these alleged breaches. Many of sellers' arguments for summary judgment are based on what they contend are flaws in Lindquist Avey's analysis. After review of the report, however, I conclude that it is for the jury to determine whether Lindquist Avey's analysis is flawed. I address below sellers' remaining arguments for summary judgment.[15]

1. Claim for Uncollected Trade Receivables

The Purchase Agreement provides a procedure for the assignment of uncollected trade receivables as follows:

> Any Trade Accounts Receivable sold to Purchaser pursuant to this Agreement, which may not have been collected within 90 days of the Closing Date, will be deemed to be Uncollected Trade Receivables. Within 20 days of the expiration of such 90 day period, Purchaser may assign and transfer some or all of the Uncollected Trade Receivables to Sellers, and, upon such assignment, Sellers shall pay to Purchaser, in immediately available funds, the full amount of the Uncollected Trade Receivables. Any Uncollected Trade Receivable not assigned and transferred to Sellers during such 20 day period shall thereafter continue to be owned by Purchaser without any recourse to sellers for failure to collect any part of such Uncollected Trade Receivable.

Purchase Agreement §7(b). AFB claims that it assigned Uncollected Trade Receivables to sellers

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A.2d 399, 401 (Pa. 1962).

[15] Lindquist Avey's report also lists damages for Freda's alleged failure to disclose the relationship between Fresh Fields Supermarkets and Marcus Giuffrida. Buyer has withdrawn this claim and thus I grant sellers' motion for summary judgment with respect to it.

pursuant to this provision, but that sellers have not paid.

Needleman assigned and transferred the Uncollected Trade Receivables by letter dated July 16, 1996, which was after the period in the agreement for transferring and assigning the receivables. AFB, however, contends that it orally transferred and assigned the receivables within the time period. Sellers move for summary judgment arguing that the plain language of the above-quoted provision mandates a written transfer and assignment and that the oral transfer and assignment of the receivables was therefore ineffective. I disagree. The language of the contract does not include any requirement of a written assignment. In addition, Pennsylvania law permits oral assignments. See In re Bryan's Estate v. Bryan, 522 A.2d 40, 42 (Pa. 1987); In re Way's, 109 A.2d 164, 171 (Pa. 1954); Grasso v. John Hancock Mut. Life Ins. Co., 214 A.2d 261, 263 (Pa. Super. Ct. 1965); Rest. (Second) Contr. § 324 ("[E]xcept as provided for by statute or contract [assignments] may be made either orally or by a writing). I therefore interpret the Purchase Agreement as permitting oral assignments and deny sellers' motion for summary judgment on this ground.

2. Claim for Undisclosed Accrual Programs

AFB presents a claim for allegedly undisclosed accrual programs that Freda established as an incentive for its jobbers and distributors. Pursuant to the Purchase Agreement, AFB did not assume all of sellers' liabilities, but only those listed in schedules attached to the Purchase Agreement. See Purchase Agreement § 2(b). The Agreement provided that if after the closing date a creditor sought payment of a claim not included in the assumed obligations, "Sellers [agreed to] jointly and severally indemnify Purchaser and hold Purchaser harmless from . . . any and all Losses incurred by Purchaser[.]" Id. at § 2(d). AFB seeks such indemnification contending that the accrual

programs are liabilities that it did not agree to assume but was forced to pay. Sellers seek summary judgment on grounds that AFB's awareness of the accrual programs prior to closing forecloses its recovery.

As AFB correctly argues, however, the Purchase Agreement expressly provided for indemnification not of undisclosed liabilities, but of liabilities not listed in the attached schedules. Therefore, whether or not AFB knew of the accrual programs prior to closing is of no import. The relevant question is whether the accrual programs were listed in the schedules of assumed liabilities, and per my review of those schedules, they were not. Summary judgment for sellers on this claim is therefore denied.[16]

3. Claim Based on Decreased Product Quality

AFB seek recovery for damages alleged caused by changes in the manufacturing process and/or purchasing methods made during the stub period which allegedly caused a drop in the quality of Freda's products.[17] Sellers seek summary judgment on this claim contending that AFB failed to present sufficient evidence of a decrease in the quality of the product or a change in the manufacturing process.[18]

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[16] Sellers also seek summary judgment contending that because the accrual programs were not guaranteed AFB failed to mitigate damages by not terminating these programs. AFB, however, argues that the termination of these accrual programs would have caused adverse goodwill among its customers. After review of the record, I conclude that mitigation is a question for the jury and that summary judgment on this ground is inappropriate.

[17] Although AFB did not identify the provision of the Purchase Agreement upon which this claim is based, sellers do not assert the lack of identification of a provision as a basis for summary judgment.

[18] Seller also presented deposition testimony from various individual involved in purchasing and the production process who testified that they had not changed their purchasing or manufacturing practices. Pursuant to the summary judgment standard outlined in § I of this Memorandum, however, I am not to make

AFB responds by referring to the affidavits of Albert Scoffone and John DeRosa. Scoffone stated that he has approximately forty years of experience in the meat distribution business and associated with Freda in various capacities for approximately thirty years during which he saw the products manufactured by Freda daily. He noted a substantial deterioration in Freda's products in approximately November, 1995, which was during the stub period, and then an improvement in the quality after the sale of Freda to AFB. See Scoffone Aff. ¶ 9-10. DeRosa also stated in his affidavit that the quality of the products decreased during the stub period. See DeRosa Aff. ¶ 7.

I conclude that buyer presented sufficient evidence of the deterioration of Freda's products to allow a jury to conclude that sellers made a change in the manufacturing process and/or the purchasing methods that adversely effected the quality of the product. Thus, summary judgment on this ground is denied.

4. Claim for Undisclosed In-House Brokerage, Murco Brokerage Company

In September 1995 Freda registered the name of "Murco Brokerage Company" as a fictitious/alternate name with Pennsylvania and New Jersey. Prior to September 1995, many Freda suppliers had existing brokerage arrangements where commissions were paid to these brokers for products sold to Freda. After Freda established Murco, however, Freda required its suppliers to use Murco rather than their existing brokerage arrangements.

In the Purchase Agreement sellers represented and warranted that they or their affiliates did not own or possessany right to any trade name not listed in an attached schedule. See Purchase Agreement § 5(k), Schedule 5(k). Murco was not listed in Schedule 5(k) and AFB contends that

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credibility judgments but must accept as true the testimony of the non-movant's witnesses.

sellers therefore breached that provision of the Purchase Agreement.[19] Sellers, however, argue that because AFB knew about Murco prior to closing it cannot recover based on a failure to disclose Murco's existence. Again, this argument assumes that AFB's knowledge of Murco would bar its claim. As discussed in § II.A of this Memorandum, however, even if AFB knew about Murco's existence prior to closing, that would not bar its breach of warranty claim. Summary judgment on this ground is therefore denied.

5. Claim for Undisclosed Tax Exemption

Both parties move for summary judgment on AFB's claim based on the alleged failure to disclosure that the property tax exemption for Kohler Urban Renewal Corporation ("Urban") was unassignable. Urban was a Freda subsidiary acquired by AFB pursuant to the Purchase Agreement, and in 1987 the City of Newark approved a "Tax Abatement Application and Financial Agreement" for property owned by Urban which exempted Urban's property from taxes until October 30, 2002. This agreement contained a provision that made the contract unassignable. See Financial Agreement, § 18.

After the closing, the City of Newark revoked the abatement/exemption and placed the property previously owned by Urban back onto the tax roles subjecting it to property taxes. AFB claims that sellers' failure to disclose that the abatement was unassignable breached the following

[19] Buyer also contends that sellers' establishment of Murco breached the representations and warranties made in § 5(e) of the Purchase Agreement. In that section, sellers represented and warranted that, except as disclosed on Schedule 5(e), that they did not enter into any transactions other than in the ordinary course of business. See Purchase Agreement § 5(e)(xii). Establishment of Murco was not included in Schedule 5(e). Buyer contends that sellers breached this provision by creating Murco during the stub period and not disclosing it on Schedule 5(e).

representation and warranty:

> Except as noted in Schedule 5(g), all *contracts included as part of the Assumed Obligations* are assignable by the Sellers to the Purchaser without the consent of any other entity or person.

Purchase Agreement § 5(g) (emphasis added).

The crux of the parties' dispute is whether the tax abatement agreement was a "contract[] included as part of the Assumed Obligations" pursuant to § 5(g). Sellers contend that they are entitled to summary judgment because under the plain language of the Purchase Agreement the tax abatement agreement was not an assumed obligation. I agree.

As discussed in § II.B.2 of this Memorandum, AFB did not assume all of sellers' liabilities pursuant to the Purchase Agreement:

> Purchaser will assume, perform and pay only those obligations under contracts, licences, leases, commitments, sales orders, purchase orders and other agreements to which any of the sellers are a party or in which the sellers have rights thereunder listed on Schedule 2(b)(1) and the Trade Payables listed on schedule 2(b)(2) constituting part of the Assets which are assigned or transferred by Sellers to Purchaser (the "Assumed Obligations").

Purchase Agreement § 2(b). Thus, by the plain language of the Purchase Agreement AFB limited the liabilities it assumed to contracts and other agreements listed in schedule 2(b)(1) and trade payables listed in schedule 2(b)(2). The schedules include an extensive listing of contractual liabilities assumed but the tax abatement agreement was not listed in either schedule, and it was therefore not one of the Assumed Obligations.[20] This interpretation is also consistent with the Purchase Agreement as a whole. Pursuant to the Agreement AFB purchased all of the assets except those separately listed and it assumed none of the liabilities except those specifically listed. Thus,

[20] The type of agreements listed on Schedule 2(b)(1) include leases for vehicles and equipment and outstanding sales and purchase orders made in the ordinary course of business.

the Agreement expansively defined assets while narrowly defined liabilities.

AFB contends that because it assumed the obligation of paying post-closing taxes on the properties acquired pursuant to the Purchase Agreement, the tax obligation was part of the Assumed Obligations. I do not agree with this interpretation. Under the Agreement, the sellers were responsible for taxes incurred prior to closing and AFB was responsible for taxes incurred after the closing. Because of its tax exemption Urban had not incurred any property tax liability prior to closing and therefore there was no liability for AFB to assume. Thus, AFB did not assume Urban's tax liability; it incurred a tax liability after the closing because it did not qualify for an exemption. Thus, the failure of sellers to disclose that the tax exemption was unassignable did not breach § 5(g) and sellers are entitled to summary judgment on this claim.

C. Counterclaim for Escrow Funds

When the parties executed the Purchase Agreement, they also entered into a General Escrow Agreement under which $1,000,000 was set aside for reimbursement of claims by AFB, all of which has now been paid to AFB. Sellers contend that AFB failed to follow the proper procedures, and is therefore required to return the $1,000,000 to the escrow fund as a matter of law. AFB contends that it did follow the proper procedures. I conclude, upon review of the record, that genuine issues of material fact preclude summary judgment on this issue.

IV. Discussion - Alleged Breach of the Employment Contract

Contemporaneously with the sale of Freda, AFB and Joseph Giuffrida entered into an employment contract under which Giuffrida was to serve as AFB's Director of Corporate Business

Development. His duties in this position were enumerated as follows:

> Participating/assisting in laying the foundation for corporate sales and business development.
>
> Assisting in the evaluation of key accounts to increase sales volume.
>
> Participating in the management of the existing Jobbers' sales force and initiating a program to attract new distributors to the Employer.
>
> Assess/determine the viability of key markets outside of Employer's current business.
>
> Participating in the Employer's future growth strategy, specifically geographic expansion and new acquisition targets, or such other duties as Employer's Board of Directors shall direct Employee to perform.

Empl. Contr. § 3.

While AFB made the salary payments due under this contract, it did not ask Giuffrida to perform any of these duties. To the contrary, AFB officials instructed Giuffrida not to come to the offices and to have no contact with customers without first notifying AFB.[21]

By letter dated September 12, 1996, however, AFB's Board of Directors requested that Giuffrida perform three assignments: (1) produce documents and answer a questionnaire concerning Murco Brokerage, including explaining the role of Giuffrida family members in that business; (2) attempt to convince family members Matthew and Marcus Giuffrida to reinstate the Fresh Fields business to AFB and to stop breaching their Non-Compete Agreements;[22] and (3) continue to have no contact with AFB's employees, associates, suppliers, customers, and brokers without AFB's prior written authorization. Giuffrida refused to perform these assignments, and AFB stopped paying him

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[21] Without citation to any authority Giuffrida contends that AFB waived any right to enforce the terms of the employment contract by not asking him to perform any tasks under the agreement. This argument is without merit; AFB made the salary payments due under the agreement and Giuffrida cannot point to any evidence that could be construed as a waiver.

[22] AFB accused Matthew and Marcus Giuffrida of entering into a business agreement where they supplied various products to Fresh Fields Supermarkets, one of Freda's largest customers prior to that sale of the business.

on grounds that he had thereby breached the employment agreement. Giuffrida then brought a breach of contract suit. Both parties moved for summary judgment contending that as a matter of law the other party breached the agreement.

As AFB admits that it stopped paying Giuffrida as required by the employment contract, it breached the contract as a matter of law if Giuffrida did not first breach the contract by refusing to perform the assigned duties.[23] The crux of the parties' dispute is thus whether the three duties assigned to Joseph Giuffrida by the September 12, 1996 letter were (1) within the scope of the duties contemplated by the employment agreement, and (2) whether these duties were assigned in good faith.

As with any other contract, employment contracts are interpreted with the goal of ascertaining the parties' intent as manifested by the language of the written agreement. Dieter v. Fidelcor, Inc., 657 A.2d 27, 29 (Pa. Super. Ct. 1995). The parties advance two different interpretations of the term, "such other duties as Employer's Board of Directors shall direct Employee to perform." Empl. Contr. § 3. AFB contends that this term gave its Board the authority to assign Giuffrida any task, without limitation. Giuffrida, on the other hand, argues that the provision contemplates only additional duties that are reasonably related to his position as AFB's Director of Corporate Business Development. I agree with Giuffrida.

The employment agreement states that Giuffrida agrees to serve as AFB's Director of Corporate Business Development and the duties it specifically enumerates are all reasonably related to that position including: participating in business development, assisting in the evaluation of key

[23] Per § 4(b) of the Employment Agreement, AFB was entitled to terminate the Agreement if Giuffrida failed to materially perform his duties in the agreement.

accounts, initiating a program to attract new distributors, assessing the viability of key markets and participating in formulating AFB's growth strategy. Only after these duties are enumerated does the agreement provide that Giuffrida is also to perform such other duties as the Board directs. Reading the contract as a whole as I must,[24] I conclude that this last provision must be read in conjunction with the other assigned duties to include only such additional duties as are reasonably related to the position of Director of Corporate Business Development.

In reaching this conclusion I reject AFB's proposed interpretation. If, as AFB contends, the last provision authorizes AFB's Board to assign Giuffrida any task without limitation the previous enumeration of specific duties would be rendered superfluous and meaningless.[25] As I construe the agreement, however, the enumeration defines the parameters of Giuffrida's position and the last provision, naturally enough, contemplates the assignment of any other tasks reasonably related to his position. See Phoenix Techs., Inc. v. Quotron Sys., Inc., 1997 WL 220285, *27 (E.D. Pa.) ("By examining the entire contract, courts safeguard against adopting an interpretation that would render any individual provision superfluous.") (citation omitted), aff'd, 135 F.3d 766 (3d Cir. 1997) (table).[26] Interpreting the employment agreement in this manner, however, does not lead to the grant of summary judgment for either party because factual questions remain as to whether the assignments given Giuffrida were in fact reasonably related to his position as Director of Corporate

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[24] See Amtrim Mining, Inc. v. Pennsylvania Ins. Guaranty Assoc., 648 A.2d 532, 535 (Pa. Super. Ct. 1994) ("The court must assess the writing as a whole, and not in discrete units[.]")

[25] Moreover, under AFB's interpretation -- as authorizing assignment of any duties whatsoever -- the contract might be void as contrary to public policy. See Rest. (Second) Contr. § 178, 185.

[26] This interpretation also prevents an attack on the employment agreement's enforceability because of uncertainty. See Bakaly & Grossman, Modern Law of Employment Relationships (Prentice Hall 1992) Ch. 3, § 3.3 (questioning enforceability of employment contract where employer agreed to hire employee to perform whatever services the employer may assign him), citing Vogel v. Pekoc, 42 N.E. 386 (Il. 1895).

Business Development.[27]

Factual questions also preclude summary judgment on Giuffrida's contention that the Board's assignment of these tasks breached its implicit duty of good faith. Under Pennsylvania law there is an implicit duty of good faith in employment contracts. See Baker v. Lafayette College, 504 A.2d 247, 255-56 (Pa. Super. Ct. 1986); Somers v. Somers, 613 A.2d 1211, 1213-14 (Pa. Super. 1992); Rest. (Second) Contr. § 205. Where an employer performs an undertaking pursuant to an employment contract -- here, the Board's assignment of duties to Giuffrida -- it must do so in good faith. Baker, 504 A.2d at 255. While the definition of bad faith varies with the context, it includes "evasion of the spirit of the bargain." Id.; Rest. (Second) Contr. § 205(d).

Giuffrida points to evidence in the record from which a jury could infer that the Board assigned these tasks knowing that he would not comply for the purpose of justifying his dismissal and the cessation of payments. If the jury accepted this evidence and inference, it could conclude that the Board's assignment and subsequent cessation of payments evaded the spirit of the bargain and amounted to a breach of contract.

AFB, however, points to evidence in the record from which a jury could conclude that the assignments were a legitimate and good faith attempt to gather information and to protect its investment in Freda. It contends, and a jury could reasonably conclude, that asking a current employee and a former officer of Freda to provide information about its purchase, to encourage his fellow sellers to abide by their non-compete agreements, and to refrain from contacting supplies,

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[27] AFB also argues that under Pennsylvania law Giuffrida owes AFB as his employer a duty of loyalty that requires him to comply with these assignments. See Pennsylvania Nurses Ass'n v. Pennsylvania State Educ. Ass'n, 90 F.3d 797, 807 (3d Cir. 1996) (Pennsylvania common law recognizes, under agency principles, a duty of loyalty by an employee to an employer) (citations omitted).

customers and employees are reasonable assignments consistent with the duties enumerated in the employment agreement. Genuine issues of material fact thus remain requiring denial of summary judgment for either party.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH H. GIUFFRIDA	:	CIVIL ACTION
	:	
v.	:	
	:	
AMERICAN FAMILY BRANDS, INC.	:	No. 96-7062

AMERICAN FAMILY BRANDS, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
GIUFFRIDA ENTERPRISES, INC, et al.	:	No. 96-7256

O R D E R

AND NOW this day of April, 1998 upon consideration of AFB's motion for partial summary judgment, sellers' motion for summary judgment, and the parties filings related thereto, for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. AFB motion for partial summary judgment is GRANTED to the extent it sought rulings as a matter of law that:

a. Sellers' representations and warranties survived closing for a period of two (2) years after closing; and

b. Section 5(e) of the Purchase Agreement which represents and warrants that there were no material adverse changes in the earnings of sellers from August 26, 1995 to closing is a clear and unambiguous promise which is not limited to events outside the ordinary course of business;

2. AFB's motion for partial summary judgment is otherwise DENIED;

3. Sellers' motion for summary judgment is GRANTED to the extent AFB sought recovery for sellers' alleged failure to disclosure the relationship between Fresh Fields Supermarkets and

Marcus Giuffrida;

4. Sellers' motion for summary judgment is GRANTED to the extent AFB sought recovery for sellers' alleged failure to disclose that the tax abatement agreement was unassignable;

5. Judgment is entered in favor of sellers and against AFB on these two claims; and

6. Sellers' motion for summary judgment is otherwise DENIED.

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THOMAS N. O'NEILL, JR. J.